In the
Supreme Court of the United States
OCTOBER TERM 1960

No. ——

MINNEAPOLIS GAS COMPANY AND METROPOLITAN UTILITIES DISTRICT OF OMAHA

Petitioners

VS.

FEDERAL POWER COMMISSION

Respondent

CITY OF DULUTH, MINNESOTA, SUPERIOR WATER, LIGHT AND POWER COMPANY, MINNESOTA VALLEY NATURAL GAS COMPANY, NORTHERN NATURAL GAS COMPANY, IOWA PUBLIC SERVICE COMPANY, IOWA POWER AND LIGHT COMPANY, NORTHWESTERN PUBLIC SERVICE COMPANY, STATE OF MINNESOTA, WILLMAR GAS COMPANY, INC.

Intervener-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Minneapolis Gas Company and Metropolitan Utilities District of Omaha pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on May 13, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, printed in Appendix A hereto, *infra*, p. 14 is reported at 278 F. 2d 870 (1960). The opinion of the Federal Power Commission (R. 363-397) is reported at 22 F. P. C. 164 (1959) and 30 P. U. R. 3d 104; the Commission's order denying rehearing (R. 407-415) is reported at 22 F. P. C. 523 (1959) and 30 P. U. R. 3d 123.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1960 (App. A, *infra*, p. 16). A timely petition for rehearing filed on May 27, 1960 (R. 421-429) was denied on June 10, 1960 (App. A, *infra*, p. 24). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and § 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, 15 U. S. C. § 717r(b) (1958 ed.).

QUESTION PRESENTED

Whether, in a certificate proceeding under § 7 of the Natural Gas Act, the "public convenience and necessity" required the issuance of a certificate authorizing a major expansion of service by an interstate pipeline company where the Federal Power Commission's decision that the new extensions would be economically feasible to the pipeline assumed an excess of revenues over the cost of service for a given period on the pipeline's pre-expanded system and completely ignored the pipeline's admission in a contemporaneous rate increase filing with the Commission that a large revenue deficiency existed on the same existing system for the same period.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, *52 Stat. 821 (1938)*, as amended, *15 U. S. C. § 717, et seq.*, are set out in Appendix B, *infra*, pp. 26-29.

STATEMENT

This case involves a decision of the Federal Power Commission pursuant to jurisdiction conferred upon it by § 7 of the Natural Gas Act, *15 U.S.C. § 717f*, which was affirmed by the United States Court of Appeals for the District of Columbia Circuit, pursuant to jurisdiction vested in it by the review provisions of § 19(b) of the Act, *infra*, p. 28.

The proceedings before the Commission were initiated by Northern Natural Gas Company, an interstate pipeline company, filing with the Commission two applications for certificates of public convenience and necessity under § 7(e) of the Act, *infra*, p. 27. Authority was sought to construct and operate the facilities to provide new gas service to 342 communities located in six states.[1] The local distribution of gas within the communities would be performed by Northern's existing and proposed utility customers (other than petitioners). The facilities proposed to be built constituted the largest pipeline expansion ever proposed for Northern's system and included an extension of its main line, various pipeline loops of existing main line, additional main line compression, branch lines to the town borders of the proposed communities and town border measuring stations. The cost of constructing the proposed facilities was esti-

[1] Northern's separate distributing branch, Peoples Natural Gas Division, would distribute gas locally in 108, or about one-third, of these communities. Prior to the instant proceedings, Peoples Natural Gas Division of Northern served 110 communities—therefore, an addition of 108 would approximately double the number served by it.

mated to be approximately $110,400,000 over the first three years.

Prior to the instant proceeding Northern owned and operated a pipeline system originating in the panhandle of Texas and extending northeasterly through Kansas, Nebraska and Iowa to the cities of Minneapolis-St. Paul, Minnesota, with branches running easterly to Dubuque, Iowa, and northwesterly into South Dakota. Before expansion it served 387 communities with a total contract demand[1a] volume of 1.34 million Mcf[1b] per day; its investment in transmission facilities was 342 million dollars (R. 302). The proposed expansion would require an investment of 110 million dollars for an addition in Northern's contract demand volumes of .23 million Mcf per day in the third year of operation.

Petitioners are two local gas distributors which purchase all of their natural gas supply from Northern. Petitioner Minneapolis Gas Company serves about 211,000 retail customers in the City of Minneapolis and environs in the State of Minnesota. It is the largest customer on Northern's system and purchases about 19 percent of Northern's total sales of gas (R. 314). Petitioner Metropolitan Utilities District provides natural gas service in the City of Omaha and environs in the State of Nebraska. It is the third largest customer on Northern's system and purchases about nine percent of Northern's total sales of gas.

Northern is entitled under existing Commission precedents to recover its entire cost of service in its rates—therefore, petitioners will ultimately pay approximately 28 per-

[1a] "Contract demand" is the agreed maximum daily volume of gas that Northern is obligated to deliver and a utility customer company is entitled to receive.

[1b] "Mcf" is a standard unit for measuring the volume of natural gas and means "one thousand cubic feet".

cent of any revenue deficiency caused by any proposed expansion of service. Accordingly, petitioners intervened in the two dockets before the Commission, in light of the magnitude of Northern's proposed expansion and the direct impact on its revenues and cost of service, to protect themselves from any undue financial burden which would be caused by an uneconomic expansion of service (R. 315-323; 306-311).

The two applications were consolidated for hearing by the Commission and a hearing held before a Presiding Examiner which concluded on June 18, 1959. Petitioners' position in the hearing was that the majority of the expansion as proposed by Northern was not economically feasible because it would impose unreasonably large financial burdens on existing customers in the future—therefore, the "public convenience and necessity" did not require the issuance of a certificate.

Upon motion by Northern, the Commission omitted the intermediate decision procedure and held oral argument on July 17, 1959. Two weeks later, on July 31, 1959, the Commission issued its opinion and order (R. 363-397) in which it issued Northern a certificate to construct and operate the facilities to serve all 342 communities for the first three years upon certain conditions.

The Commission recognized that one of "the more important issues" in the proceeding was "whether various communities proposed to be served return so little of Northern's costs that they will increase the financial burden upon Northern's existing customers" (R. 367). In resolving this issue, the Commission found that the expansion project as proposed was not economically feasible to Northern because it would create substantial revenue deficiencies which would cast an undue burden on present customers. In its attempt to cure the uneconomic aspects of the proposed

expansion, the Commission required as a condition of the certificate that capital contributions be made for certain portions of the new facilities which were unsupported by revenues. If a local distributor for a proposed community on an uneconomic branch line did not agree to make the required contribution, gas service to that particular community would be denied. (R. 374-379.)

The Commission concluded that the feasibility of Northern's entire project would be enhanced as a result of its contribution plan (R. 378) and "it would appear that no undue burden will be placed on the present customers" (R. 379). The only findings regarding the economic feasibility of the proposed projects were in similar general language. Nowhere did the Commission find what the rate of return would be to Northern from the new extensions on either a systemwide or incremental basis.[2]

Eight days *after* the record had closed in this proceeding, on June 26, 1959, Northern filed its "eighth"[3] rate increase application with the Commission pursuant to § 4 of the Act, *15 U. S. C. § 717c*, in a different docket—No. G-19,040.

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[2] On a systemwide basis the new extensions are considered together with the pipeline's existing system. Here, a comparison of the cost and revenue figures for the pipeline's existing system (pre-expanded) is a requisite.

On an incremental basis the new extensions are viewed as independent segments without reference to a pipeline's existing system.

[3] Northern's "first" rate increase filing was made with the Commission in Docket No. G-1382 in March, 1950. The practice of Northern's utility customers is to number consecutively Northern's subsequent rate increase filings for convenience in referring to them.

Northern presently has pending its sixth, seventh and eighth rate increase filings under which it is collecting approximately 25 million dollars per year subject to the refund provisions of § 4 of the Act. The sixth was filed in Docket No. G-12,153 on February 27, 1957; the seventh was filed in Docket No. G-15,335 on May 27, 1958; the eighth was filed in Docket No. G-19,040 on June 26, 1959.

In this filing Northern requested increased rates in an amount of 8.5 million dollars per year to cover revenue deficiencies on its then existing (pre-expanded) system. These increased rates have been collected from petitioners and Northern's other customers since December 27, 1959, subject to the refund provisions of § 4. Although this rate filing was made five weeks *before* the Commission's decision herein and although the fact of the filing was presented at oral argument in the instant proceeding, the Commission completely ignored it and its impact on the proposed expansion of Northern's system. The Commission's order and opinion is silent on the point.

Rehearing was denied by the Commission on September 18, 1959 (R. 407-415). The Commission explained the purpose of the contribution plan developed by it,[4] but adhered to its previous position:

> "In any case, we do not hesitate to find that the contributions contemplated by our Opinion No. 324 will represent a reasonable amelioration of revenue deficiencies and, taken with the expected revenues will enable us to avoid denying service completely to the revenue deficient communities" (R. 410).

Again, no finding was made as to what the new facilities would return to Northern on either a systemwide or incremental basis.

Petitioners sought and were granted review in the Court below. When the answering brief of the Commission was received, petitioners were presented for the first time with a claim that Northern's systemwide revenues from jurisdic-

[4] "To ameliorate in some degree the pronounced revenue deficiencies a new method was employed of requiring as a condition of the certificate granted to Northern that capital contributions be made for that portion of the branch lines and metering stations unsupported by revenues" (R. 419).

tional services *after* expansion in the third year of operation would be approximately 1.5 million dollars more than its cost of service including a 6½% rate of return (Resp. Br., p. 23).[5] Northern's eighth rate increase filing was not considered in this calculation.

The petitioners met this argument at their first opportunity in their reply brief by showing that the reliance on systemwide revenues for the expanded system in excess of the systemwide cost of service was untenable in light of Northern's eighth rate increase filing (Pet. Rep. Br., pp. 2-8).

The Court below affirmed (App. A, *infra*, pp. 14-16). Its opinion was silent, however, on the impact of Northern's eighth rate filing on the Commission's opinion and order.

In their petition for rehearing filed on May 27, 1960, the petitioners again raised the contradiction between the basis of the Commission's opinion and the showing made by Northern in its eighth rate increase application (App. A, *infra*, pp. 17-24); the Court below denied rehearing on June 10, 1960 (App. A, *infra*, pp. 24-25).

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[5] The position of the intervener-respondents (including Northern) in the Court below was that the estimated revenues from Northern's expanded system in the third year of service would be more than the cost of service including a 6-1/2% rate of return by approximately .47 million dollars (Int. Br., p. 18). Northern's eighth rate increase filing was not considered in this calculation.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court below gives judicial sanction to the Commission's action of permitting an applicant in a pipeline certificate proceeding to use one set of cost and revenue figures for the economic feasibility of a proposed expansion, while permitting the same applicant in a contemporaneous rate increase proceeding, to use a materially different set of cost and revenue figures for the same period and on the same pipeline system for the raising of its rates.

A consideration of the cost of service and revenue figures contained in Northern's eighth rate increase filing is indispensable in the instant proceeding. The Commission, however, ignored the impact of the large revenue deficiencies shown by Northern in Docket No. G-19,040 for its pre-expanded system. The Commission's position, in its brief below, was that its decision regarding the feasibility of the proposed extensions was lawful because: Northern would receive systemwide revenues which were 1.5 million dollars in excess of its total cost of service (including a 6½% rate of return) in the third year of operating the new facilities.

This position is untenable as a matter of mathematical certainty when Northern's revenue and cost figures in this proceeding are compared with those in its eighth rate increase filing.

The proposed extensions when viewed independently (*i.e.*, on an incremental basis) will return to Northern 4.2 million dollars *less* than their total cost of service in the third year of operation (R. 266, L. 3 plus R. 278, L. 3). Therefore, if the Commission is correct that Northern will

have systemwide revenues in the third year of serving the new communities in excess of its total cost of service by 1.5 million dollars, Northern's pre-expanded system would have had to have "excess revenues" of 5.7 million dollars.[6]

Northern showed, however, in its eighth rate increase filing, not only that there were no "excess revenues" on its existing system, but that the revenues from its existing system were 8.5 million dollars deficient of meeting the cost of service (including a 6½% rate of return).[7]

The Commission's decision that the proposed extensions were economically feasible, using the phantom systemwide excess revenues, cannot be reconciled with Northern's eighth rate increase filing. If the excess revenues actually did exist, there would have been no eighth rate increase application by Northern—instead, a rate reduction by Northern would have been required. It appears that one set of cost-revenue figures was used for this case while at the same time another set was used for Northern's rate case on the same facilities and for the same period. The first opportunity that petitioners had to raise these matters was in their reply brief in the Court below.

The Court below either overlooked or misinterpreted these facts as evidenced by its affirmance of the Commis-

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[6] The systemwide figures reflect the estimated results of the operation of Northern's existing system (before expansion) plus the new extensions proposed herein. If the revenues from the new extensions are 4.2 million dollars less than the cost of service on the new extensions and the systemwide revenues are 1.5 million dollars more than the systemwide cost of service, *a fortiori*, Northern's existing system (before expansion) must have an excess of revenues over all costs of 5.7 million dollars.

[7] Northern's rate increase filing in Docket No. G-19,040 was for about 10 million dollars per year on its pre-expanded system, based upon a 6-3/4 percent rate of return. If a 6-1/2 percent rate of return had been used as was done in the instant proceeding, Northern's filing would have been in an amount of approximately 8.5 million dollars.

sion's opinion and order. These crucial events which came to light during the pendency of this appeal should not have been ignored. *City of Pittsburgh v. Federal Power Commission, 237 F. 2d 741, 752, fn. 33 (D. C. Cir. 1956).*

II.

If the decision of the Court below is allowed to stand, the requirement that proposed extensions of service be economically feasible to the applicant and not cast an undue burden on existing customers will be dropped as an element of the concept "public convenience and necessity" to the detriment of natural gas consumers everywhere.

This is a case of first impression in which the fundamentals of the requirement of economic feasibility as to extensions into new territory by a pipeline serving existing customers are being evolved. If the lower court's decision that the record herein supports the Commission's findings on economic feasibility is correct notwithstanding the direct contradiction of that record by Northern's admissions in its eighth rate increase application, the requirement of economic feasibility has been read out of the law to the detriment of the existing customers.

In *Atlantic Refining Co. v. Public Service Commission of New York, 360 U. S. 378 (1959)* this court was concerned with the economic effect on the ultimate consumer of gas purchases—here, the economic effect on the ultimate consumer of a major pipeline expansion is involved. To protect the consumer against exploitation in one of these areas and not the other will defeat the primary purpose of the Natural Gas Act. The impact of higher rates on the consumer is not lessened because the increases were triggered by uneconomic pipeline expansions of service rather than

unwarranted purchases of new gas supplies at high initial prices.

Petitioners (and the consumers of gas generally) have no protection against excessive gas prices caused by uneconomic expansions of service by a pipeline except the requirement of economic feasibility contained in the concept of "public convenience and necessity." This requirement and its intended protection are gone if one set of cost-revenue figures can be used by an applicant in a certificate proceeding under § 7 (to demonstrate that a pipeline system will generate sufficient revenues) while the same applicant can use a different set of cost-revenue figures in a rate proceeding under § 4 (to support a claim that the revenues are insufficient from the same facilities for the same period).

The Court's decision below overlooks the irreparable harm which will result to petitioners and the ultimate consumers served by them from affirmance of the Commission's opinion and order. When revenue deficiencies to Northern are caused by an uneconomic expansion, these deficiencies will be paid by the ultimate consumers in the form of higher rates. The economic risk of expansion is on the consumers, not on the pipeline company.

This is not a case where Northern has a legal duty, either by franchise or statute, to expand its facilities. The Natural Gas Act does not require, nor could the Commission force, Northern to extend its service involuntarily. The expansion here was voluntarily proposed by Northern and can be lawfully certified by the Commission only when required by the public convenience and necessity.

CONCLUSION

For all the foregoing reasons, it is urged that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: September 3, 1960.

APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

No. 15433

Minneapolis Gas Company, et al., Petitioners

v.

Federal Power Commission, Respondent

City of Duluth, Minnesota, Superior Water, Light and Power Company, Minnesota Valley Natural Gas Company, Northern Natural Gas Company, Iowa Public Service Company, Iowa Power and Light Company, Northwestern Public Service Company, State of Minnesota, Willmar Gas Company, Inc., Intervenors

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On Petition for Review of Orders of the
Federal Power Commission

Decided May 13, 1960

Mr. George C. Mastor, with whom Messrs. P. L. Farnand and George C. Pardee were on the brief, for petitioners.

Mr. Richard C. Steffey, Attorney, Federal Power Commission, of the bar of the Supreme Court of Virginia, pro hac vice, by special leave of court, with whom Messrs. Willard W. Gatchell, General Counsel, Federal Power Commission, Howard E. Wahrenbrock, Solicitor, Federal Power Commission, and Robert L. Russell, Assistant Gen-

eral Counsel, Federal Power Commission, were on the brief, for respondent.

Mr. Justin R. Wolf, with whom Mr. Charles A. Case, Jr., and Mrs. Louise C. Powell were on the briefs for intervenor Northern Natural Gas Company, argued for all intervenors except City of Duluth and Superior Water, Light and Power Company.

Mr. Harold J. Soderberg was on the brief for intervenor State of Minnesota.

Messrs. John W. Scott and Louis L. Da Pra were on the brief for intervenor Minnesota Valley Gas Company.

Mr. Robert S. Hunt was on the brief for intervenors Iowa Public Service Company, Iowa Power and Light Company, and Northwestern Public Service Company.

Mr. Bryce Rea, Jr., was on the brief for intervenor Willmar Gas Company.

Messrs. Glen H. Bell and Charles P. Seibold entered appearances for intervenors City of Duluth, Minnesota, and Superior Water, Light and Power Company.

Before Edgerton, Danaher, and Burger, Circuit Judges.

Edgerton, Circuit Judge: Petitioners seek review of the Federal Power Commission's opinion and order of July 31, 1959, and its order of September 18, 1959, granting certificates of public convenience and necessity under § 7(c) of the Natural Gas Act, 52 Stat. 825, as amended, 15 U. S. C. 717f(c). The orders authorize Northern Natural Gas Company to extend its pipelines and bring natural gas service to more than 300 communities in Nebraska, South Dakota, Iowa, Illinois, Wisconsin, and Minnesota. 22 FPC 164, 523.

Petitioners are local gas distributors that buy from Northern. They object to the Commission's orders because, on the basis of the rates now charged Northern's customers, the new service will not yield to Northern in the first three years as high a percentage of profit as the present service, and

may therefore tend to keep up the rates which petitioners pay to Northern.

The various parts of a public utility's system need not and cannot be equally profitable. Puget Sound Traction, Light & Power Co. v. Reynolds, 244 U.S. 574, 581. The record supports the Commission's finding that Northern's project will be economically "feasible particularly after * * * provisions * *.* for customers who may not pay their proper share of Northern's cost of service." Service on certain lines is authorized only on condition that the distributors on those lines make certain contributions to initial costs. The record also supports the Commission's conclusion that the new service is required by the public convenience and necessity. The Commission properly weighed the interests that will be served against those that will be injured and did not strike an arbitrary balance. Cf. Democrat Printing Co. v. Federal Communications Commission, 91 U.S.App.D.C. 72, 202 F. 2d 298.

Affirmed.

Before: Edgerton, Danaher and Burger, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders of the Federal Power Commission on review in this case are affirmed.

per Circuit Judge Edgerton.

Dated: May 13, 1960.

Filed: May 13, 1960, Joseph W. Stewart, Clerk.

PETITION FOR REHEARING

To the United States Court of Appeals for the District of Columbia Circuit and the Judges thereof:

Petitioners in the above entitled case present this their petition for a rehearing of said case and hereby petition for rehearing by the full Court sitting en banc and, if the full Court denies rehearing, for rehearing by the division which rendered the decision of May 13, 1960, that division consisting of Edgerton, Danaher and Burger, Circuit Judges.

Petitioners' reasons for seeking rehearing are as follows:

I.

The Court either overlooked or misinterpreted the effect of Northern's eighth rate increase filing[1] in Docket No. G-19,040 when it stated:

> "The record supports the Commission's finding that Northern's project will be economically 'feasible particularly after * * * provisions * * * for customers who may not pay their proper share of Northern's cost of service.' * * *' The record also supports the Commission's conclusion that the new service is required by the public convenience and necessity. The Commission properly weighed the interests that will be served against those that will be injured and did not strike an arbitrary balance."

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[1] Northern's first rate increase filing was made with Respondent in Docket No. G-1382 in March, 1950. The practice of Northern's customer companies is to number Northern's subsequent rate increase filings consecutively for convenience in referring to them. Northern presently has pending its sixth, seventh and eighth rate increase filings under which it is collecting approximately 25 million dollars per year under bond.

The sixth was filed in Docket No. G-12,153 on February 27, 1957; the seventh was filed in Docket No. G-15,335 on May 27, 1958; the eighth was filed in Docket No. G-19,040 on June 26, 1959.

The basis for the Commission's decision on the economic feasibility of the new service was stated specifically for the first time in its brief (Resp. Br., p. 23):

> "Northern's revenues from jurisdictional services on its expanded system during the third year of the new services will be * * * more than its * * * total 'cost' of these services (all operating expenses, fixed costs including a 6½% profit, associated income taxes, etc.)."

The only mention of any specific rate of return to Northern in either the Commission's Opinion No. 324 (R. 11693-11720) or its Order Denying Rehearing (R. 11762-11767) was the following recital (R. 11700):

> "Northern estimates that in the third year of service to the 342 communities, it will earn in excess of a 6½% rate of return on its entire system although the rate of return on the incremental facilities to be constructed in the two dockets will be somewhat short of this, but will still represent a substantial return on its investment."

The consideration of Northern's eighth rate increase filing becomes vital when the economic feasibility of the new extensions is determined on a system-wide basis together with Northern's existing system.[2] In order for Northern to have a system-wide rate of return in excess of 6½% in the third

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[2] A comparison of the cost and revenue figures shown for Northern's existing system in this case with the cost and revenue figures shown for Northern's existing system in its eighth rate increase filing need not be made when the economic feasibility of the new extensions is considered on an incremental basis. On that basis the new extensions are viewed as independent segments without reference to the existing system or the system-wide rate of return.

year of service, it is necessary for the system *before* expansion to have a rate of return far in excess of 6½% in order to offset the large revenue deficiencies from the new extensions.

The eighth rate increase filing shows, however, that Northern's existing system is 8.5 million dollars short of meeting its cost of service with a 6½% rate of return in 1959—to say nothing of the third year of service to the new communities (Pet. Rep. Br., pp. 2-8). It is just not possible for Northern's existing system to have revenues in excess of its cost of service as stated by the Commission in this case and, at the same time, to be 8.5 million dollars deficient in meeting its cost of service as claimed by Northern in Docket No. G-19,040.

Petitioners had no opportunity whatever in the hearings below to present evidence or to be heard on the economic feasibility of the new service in light of the higher cost and lower revenues contained in Northern's eighth rate filing.[3] In response to the Commission's statement (first advanced in its brief) that Northern's system-wide rate of return would be in excess of 6½% in the third year of the new service, the Petitioners emphasized, both in their Reply Brief (Pet. Rep. Br., pp. 2-8) and at oral argument, that the cost and revenue figures in this case are directly contradicted by those contained in the eighth rate case.

The Court's decision sanctions the Commission's action in permitting Northern to use one set of cost and revenue figures in this certificate case *while at the same time it used a different set of figures with higher costs and lower rev-*

[3] The record before the Commission closed on June 18, 1959 (R. 11695). *Eight days later*, on June 26, 1959, Northern filed its eighth rate increase application in Docket No. G-19,040—this filing was made five weeks before the Commission issued its Opinion No. 324 herein granting the certificates to Northern.

enues in a rate increase case in a different docket.[4] The Commission completely ignored the impact of Northern's eighth rate increase filing on the economic feasibility of the new extensions and on Northern's system-wide rate of return after expansion—notwithstanding the fact that Northern's rate increase filing was made in Docket No. G-19,040, five weeks before the Commission's decision herein was issued. The Commission therefore did not properly weigh the interests that will be served against those that will be injured.

On the facts before this Court it is financially impossible for Northern to earn a system-wide rate of return in excess of 6½% in the third year of the new service because of the current revenue deficiencies shown by Northern for its existing system in Docket No. G-19,040 (Pet. Rep. Br., pp. 2-8).[5]

The differences between the figures used in these two cases for the same items are major (Pet. Rep. Br., pp. 2-10) but may be pointedly illustrated by referring to the cost of construction of the extension to Duluth, Minnesota, and the first-year sales figures estimated for Duluth. Here, the cost of constructing the Duluth extension was shown at $12,794,900 (R. 4227—$12,302,800 plus 4% for interest and overheads); in Northern's rate case the cost of the same item is shown at $14,498,600 (Docket No. G-19,040, Ex.

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[4] Docket No. G-19,040—Northern has been collecting this rate increase subject to refund since December 27, 1959.

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[5] Also, it is financially impossible because of the withdrawal of the Minnesota Iron Range project as certified by the Commission. By letter to the Commission dated March 14, 1960, Iron Ranges Natural Gas Company, the proposed distributor for the area, officially abandoned the project as certified. The revenue deficiencies to Northern therefore will be greater by $608,984 per year than before the Commission granted the certificates conditioned upon certain contributions being made toward initial costs (Pet. Br., pp. 36-37).

No. 1, Sch. C-2, Sh. 2, lines 31-34) *or 16.8% higher*. Here, the first-year sales for Duluth were estimated at 7,425,803 Mcf (R. 5090); in the rate case, the first-year sales for Duluth were estimated at 2,719,300 Mcf (Docket No. G-19,040, Ex. No. 3, p. 18, line 22, col. 4) *or 63.4% less*.

The Petitioners have been whipsawed between the low cost-high revenue figures used by Northern and the Commission to test the feasibility of the proposed extensions and the high cost-low revenue figures contained in Northern's eighth rate filing, Docket No. G-19,040, which form the basis for the rates which are now being paid to Northern subject to refund.

The evidence as to Northern's costs and revenues contained in the eighth rate increase filing, Docket No. G-19,040, is material to a determination of the issues in this case. This evidence was not part of the record before the Commission and was not considered by it. The Petitioners could not adduce such evidence in the proceedings before the Commission because the eighth rate increase filing was made by Northern eight days after the record below had closed—in fact, the first knowledge Petitioners had that the Commission based its decision upon the finding that Northern would have system-wide revenues sufficient to pay its entire cost of service including a 6½% rate of return in the third year of the new service was when Petitioners received the Commission's brief in this case. Petitioners, therefore, apply to this court as part of this Petition for Rehearing and pursuant to § 19(b) of the Natural Gas Act, *15 U.S.C. § 717r(b)*, for leave to adduce additional evidence; Petitioners request that the proceedings be remanded to the Commission for further hearings so that evidence may be taken on the costs and revenues shown by Northern in its eighth rate increase filing and the effect of

such evidence upon the economic feasibility of the new extensions of service.

II.

The Court misinterpreted Petitioners' basis for appeal, as evidenced by the following statement:

> "* * * They object to the Commission's orders because, on the basis of the rates now charged Northern's customers, the new service will not yield in the first three years as high a percentage of profit as the present service, and may therefore tend to keep up the rates which petitioners pay to Northern."

Northern's stated policy is to obtain a 6½% rate of return on all of its operations (R. 3345). The new service will return so little revenue to Northern that its revenues will be deficient by a minimum of $16,610,314 in the first three years of service (Pet. Br., pp. 34-40; Pet. Rep. Br., pp. 12-13, 15-16) and an indeterminate amount continuing thereafter. Thirty-two percent of this revenue deficiency caused by the new service will have to be paid by Petitioners and the balance by Northern's other existing customers because, under existing Commission precedents, pipelines are entitled to recover their entire cost of service in increased rates. Petitioners object in this case because they will be forced to pay unreasonably large rate increases to Northern in the future which will be directly attributable to the uneconomic extensions.

III.

The Court's opinion and decision overlook the irreparable harm which will result to Petitioners and the consumers served by them. When the large revenue deficiencies which

will result from the new service appear in Northern's future rate increase filings, there is no remedy available to protect the Petitioners against this undue financial burden. The pipeline costs which originate in certificate cases are collected from all customers in subsequent rate cases. The alternative to this irreparable damage is to remand the proceedings so that the Commission may re-examine its findings in light of Northern's higher costs and lower revenues contained in the eighth rate increase filing and in light of the withdrawal of the Minnesota Iron Range project.

The situation with Northern in this case is distinguishable from that of a local distributor which has a legal duty, either by franchise or statute, to serve everyone within a certain geographical area. An expansion of facilities under *§ 7, 15 U.S.C. § 717f*, of the Natural Gas Act is proper only when the minimum elements of "public convenience and necessity," including the economic feasibility of the new facilities have been proved. Northern voluntarily proposed this expansion and can complete it without any economic risk since the expense, including any revenue deficiencies, will ultimately be paid by Petitioners and other existing utility customers.

Conclusion

For the reasons stated above, Petitioners request that a rehearing be granted by the full Court, sitting en banc, and if denied by the full Court, by the division which rendered the decision of May 13, 1960, and that on such rehearing the judgment of this Court be reversed and these proceedings remanded to the Commission for further hearings concerning the economic feasibility of the communities listed in Appendix B to Petitioners' brief herein (pp. 3a-7a) in light of the revenue deficiencies shown by Northern in

Docket No. G-19,040 and the withdrawal of the Minnesota Iron Range project.

Respectfully submitted,

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Filed May 27, 1960, Joseph W. Stewart, Clerk.

Before: Edgerton, Danaher, and Burger, Circuit Judges, in Chambers.

ORDER

Upon consideration of petitioners' petition for rehearing, it is

Ordered by the court that the petition for rehearing is denied.

Per Curiam.

Dated: June 10, 1960
Filed June 10, 1960, Joseph W. Stewart, Clerk.

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER

Upon consideration of petitioners' petition for a rehearing en banc, it is

Ordered by the court that the petition for rehearing en banc is denied.

Per Curiam.
Dated: June 10, 1960

Filed June 10, 1960, Joseph W Stewart, Clerk.

APPENDIX B

The Natural Gas Act, *52 Stat. 821* (1938), as amended, *15 U.S.C. § 717 et seq.*, provides in pertinent part, as follows:

Sec. 7. [15 U.S.C. §717f] **Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings.**

* * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have

the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *

Sec. 19(b). [15 U.S.C. §717r(b)] **Rehearings; court review of orders.**

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in Section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evi-

dence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28. As amended Aug. 28, 1958, Pub. L. 85-791, § 19, 72 Stat. 947.